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IN THE
COURT OF APPEALS OF INDIANA

RAYMOND A. STEWART,	)	
	)	
Appellant-Petitioner,	)	
	)	
vs.	)	No. 47A01-0607-CR-293
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Respondent.	)	

APPEAL FROM THE LAWRENCE SUPERIOR COURT
The Honorable William Sleva, Judge
Cause No. 47D02-0511-FD-903

April 13, 2007

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Defendant, Raymond A. Stewart (Stewart), appeals his sentence for theft, a Class D felony, Ind. Code § 35-42-4-2(a).

We affirm.

ISSUE

Stewart raises one issue on appeal, which we restate as follows: Whether the trial court properly sentenced Stewart.

FACTS AND PROCEDURAL HISTORY

On October 16, 2005, Stewart woke up from a drug and alcohol induced sleep. Not wanting to come down from his high, and knowing his father, Dennis Voorhies (Voorhies), had pain pills at his house, Stewart went to his father's house and took Oxycodone pills without permission. Voorhies confronted Stewart about the missing medication and Stewart admitted to taking the pills. Stewart offered Voorhies money for the pills, but Voorhies needed the pills for his pain.

On October 17, 2005, Voorhies reported the theft of his medication to the Bedford Police Department. The police contacted Stewart to conduct an interview. Stewart failed to appear for the interview.

On November 4, 2005, the State filed an Information charging Stewart with Count I, theft, a Class D felony, I.C. § 35-42-4-2(a). On November 15, 2005, Stewart pled guilty pursuant to a plea agreement capping any sentence at two years executed and

dismissing a public intoxication charge, a Class A misdemeanor offense.[1] On March 23, 2006, at a sentencing hearing the trial court sentenced Stewart to two years at the Department of Correction finding his criminal history as an aggravating circumstance. Additionally, the trial court noted that because Stewart was on probation in Orange County the instant sentence must be served consecutive to any sentence there.

Stewart now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

Stewart argues the two-year sentence imposed by the trial court is inappropriate. Specifically, Stewart claims the sentence is inappropriate in light of the mitigating factors – guilty plea, attempts at restitution, and lack of harm to a person or property – the trial court failed to consider when sentencing him.

Stewart was sentenced under Indiana's new advisory sentencing scheme, which went into effect on April 25, 2005. Under this scheme, "Indiana's appellate courts can no longer *reverse* a sentence because the trial court abused its discretion by improperly finding and weighing aggravating and mitigating circumstances[;]" appellate review of sentences in Indiana is now limited to Appellate Rule 7(B). *McMahon v. State*, 856 N.E.2d 743, 748-49 (Ind. Ct. App. 2006) (emphasis added). Thus, the burden is on the defendant to persuade this court that his or her sentence is inappropriate. *Id.* at 749. Nonetheless, an assessment of aggravating and mitigating circumstances is still relevant to our review for appropriateness under the rule, which states: "The [c]ourt may revise a

[1] It is unclear from where the public intoxication charge arises. Stewart's Presentence Investigation Report refers to "P.I., a Class 'A' Misd.," but there is no Information to that effect elsewhere in the record. (Appellant's App. p. 14).

sentence authorized by statute if, after due consideration of the trial court's decision, the [c]ourt finds that the sentence is inappropriate in light of the nature of the offense and the character of the offender." *Id.* at 748-49. We will therefore consider the aggravating and mitigating circumstances identified by the trial court in addressing Stewart's argument that his sentence in inappropriate.

Stewart claims his guilty plea should have been entitled to significant mitigating consideration. In support of that proposition, Stewart relies on *Antrim v. State*, 745 N.E.2d 246, 248 (Ind. Ct. App. 2001), which states, a "defendant's guilty plea may be a significant mitigating factor as it saves court time and judicial resources." This is not to say the substantial benefit to the defendant must be at sentencing. There are situations when a defendant greatly benefits from a guilty plea, and as a result may not be so deserving of a benefit at sentencing. If, for example, the benefit is in exchange for pleading guilty a benefit must not also necessarily be extended at sentencing. *See Sensback v. State*, 720 N.E.2d 1160, 1165 n.4 (Ind. 1999) (defendant's benefit was received when the State amended the charge from a Class A felony carrying twenty to fifty years to a Class B felony carrying six to twenty years).

Here, while Stewart immediately pled guilty to theft, a Class D felony, he also pled guilty in exchange for a plea agreement capping his sentence at two years executed and dismissing the public intoxication offense. While the trial court undoubtedly appreciated the time Stewart saved by pleading guilty, we cannot find the trial court improperly failed to consider Stewart's pleading guilty when assigning his sentence due to the sentencing cap and dismissal of the public intoxication offense.

Stewart also challenges the trial court's failure to recognize his attempts at restitution and that the instant offense neither caused nor threatened serious harm to people or property as mitigating factors. As the State points out, however, Stewart offered to pay restitution out of the proceeds received from selling the pills he took from Voorhies and did in fact harm someone as Voorhies actually required the pills for pain. Additionally, Stewart still owed a prior victim restitution. Thus, we cannot find the trial court erred by failing to recognize either of these proffered mitigators.

In light of Stewart's character, as evidenced by his lengthy criminal history, still owing restitution on a prior offense, and offering to pay restitution to his father from the proceeds of selling the pills he took from his father, we find a two-year executed sentence appropriate. Additionally, in light of the nature of this offense, stealing pain medication from his father who required the pills for pain, we also find the trial court's imposition of a two-year executed sentence was not inappropriate.

CONCLUSION

Based on the foregoing, we find the two-year sentence imposed by the trial court to be appropriate.

Affirmed.

NAJAM, J., and BARNES, J., concur.